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No. 427

In the Supreme Court of the United States

OCTOBER TERM, 1939

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ALFRED C. FULLER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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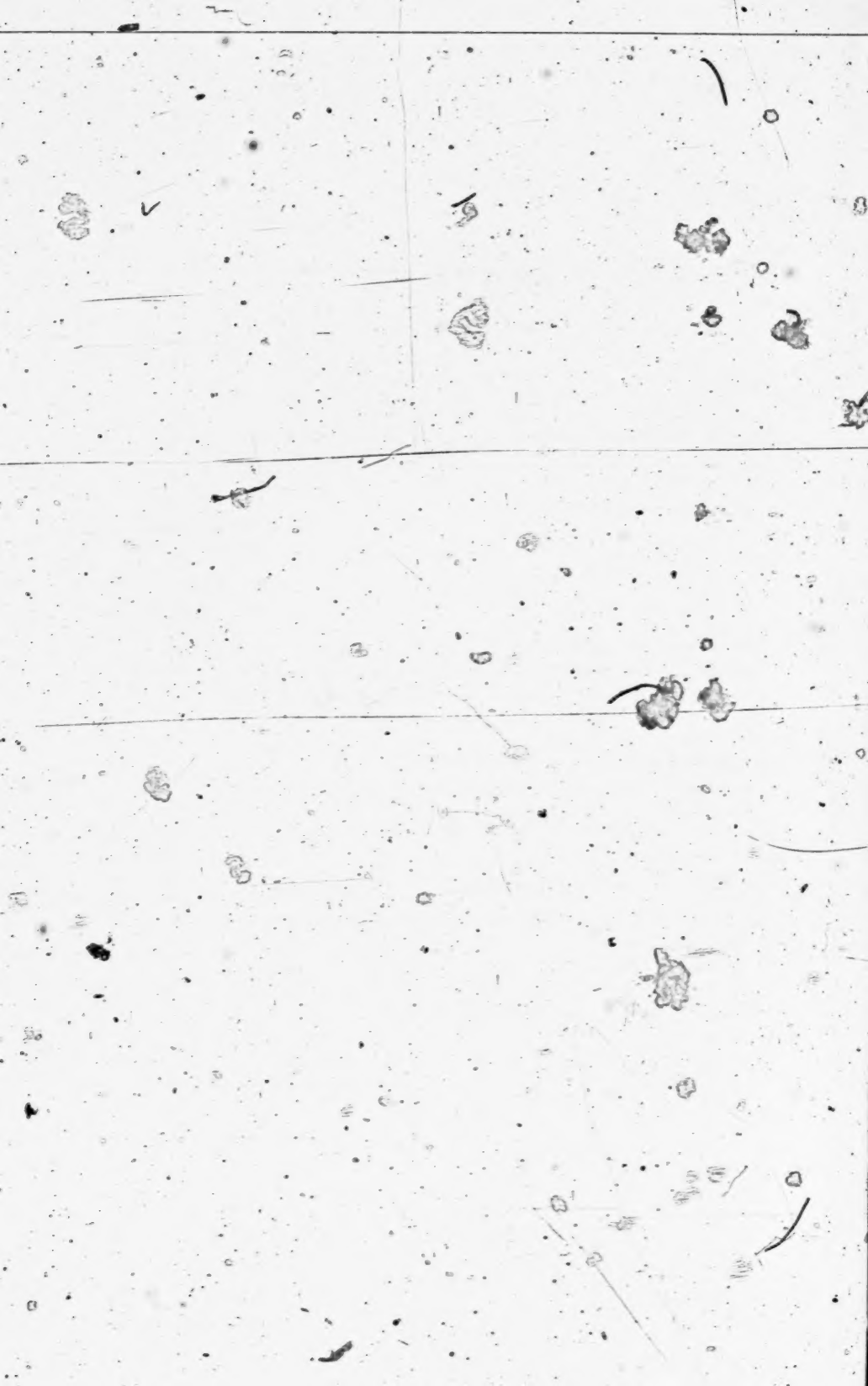

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v.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of Guy T. Helvering, Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, entered in the above-entitled cause on July 19, 1939, reversing the order [1] of the Board of Tax Appeals.

[1] Although the judgment of the court below refers to the "order" of the Board of Tax Apeals, the petition for review herein (R. 74–78) related to two decisions of the Board, one covering the years 1931 and 1932 (R. 72) and the other the year 1933 (R. 73).

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 63–71) is unreported. The *per curiam* opinion of the Circuit Court of Appeals (R. 84) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 19, 1939 (R. 85). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether income paid to the respondent's divorced wife under the provisions of a trust which was created by him for her maintenance and support, pursuant to an agreement between them which was approved in the divorce decree, should be included in respondent's income.

STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved will be found in the Appendix, *infra*, pp. 6–7.

STATEMENT

The facts as stipulated (R. 30–50) and found by the Board of Tax Appeals (R. 63–67) may be summarized as follows:

On July 25, 1930, respondent and his wife entered into an agreement in contemplation of divorce

which provided among other things for the creation by respondent of a trust of certain stock to continue for ten years. During the life of the trust, the income was to be applied to the maintenance and support of the wife, and at the termination of the trust, the trust property was to be transferred to her outright (R. 63–65). The parties agreed to waive all claims against each other arising out of the marital relation (R. 65).

On November 12, 1930, respondent's wife obtained a divorce decree in Nevada. The decree expressly approved the agreement of July 25, 1930 (R. 65–66).

On December 22, 1930, respondent created the trust provided for in the agreement, and the income from the trust estate in 1931, 1932, and 1933 was disbursed for the benefit of respondent's wife in accordance with the terms of the agreement (R. 66–67).

Respondent did not include this income in his tax returns for the years in question (R. 67), but the Commissioner assessed deficiencies with respect thereto (R. 63, 12, 27). The decisions of the Board of Tax Appeals sustaining the action of the Commissioner were reversed by the court below.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In excluding from the gross income of respondent income paid to his divorced wife from a

trust established by respondent for her maintenance and support pursuant to an agreement between them approved in the divorce decree.

2. In failing to hold respondent taxable under the doctrine of *Douglas* v. *Willcutts*, 296 U. S. 1, upon said income, as income paid out to his wife under a trust created by him to discharge his legal obligation to support her.

3. In holding that the doctrine of *Douglas* v. *Willcutts* is inapplicable unless by state law the divorce court retains power to change its original alimony award.

4. In failing to affirm the decisions of the Board of Tax Appeals and in reversing the "order" of that Board.

REASONS FOR GRANTING THE WRIT

This petition presents the same issue as *Helvering* v. *Fitch*, No. 243, present Term, in which the Government has filed a petition for certiorari to review the judgment of the Circuit Court of Appeals for the Eighth Circuit in *Fitch* v. *Commissioner*, 103 F. (2d) 702, although that case involves an alternative question as to Iowa law which is not presented here.

The issue common to this case and to the *Fitch* case is also presented in *Commissioner* v. *Leonard* decided June 30, 1939, in which a petition for certiorari is also being filed by the Government to review the judgment of the Circuit Court of Appeals for the Second Circuit.

Reference is made to the petition filed in the *Fitch* case for the reasons for granting the writ requested.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

ROBERT H. JACKSON,
Solicitor General.

SEPTEMBER 1939.

APPENDIX

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 22. GROSS INCOME.

(*a*) *General definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.

* * * * *

SEC. 24. ITEMS NOT DEDUCTIBLE.

(*a*) *General rule.*—In computing net income no deduction shall in any case be allowed in respect of—

(1) Personal, living, or family expenses;

* * * * *

Treasury Regulations 74, promulgated under the Revenue Act of 1928:

ART. 83 *Gifts and bequests.*—Property received as a gift, or received under a will or under statutes of descent and distribution, is exempt from the income tax, although the income therefrom derived from investment, sale, or otherwise is not. An amount of

principal paid under a marriage settlement is a gift. Neither alimony nor an allowance based on a separation agreement is taxable income. (See article 281.)

ART. 281. *Personal and family expenses.*— * * * Alimony and an allowance paid under a separation agreement are not deductible from gross income. (See article 83.) * * *

The above quoted provisions of the law and regulations are the same as the corresponding provisions of the Revenue Act of 1932 and the regulations appertaining thereto (Sections 22 and 24; Regulations 77, Articles 83 and 281).

U. S. GOVERNMENT PRINTING OFFICE: 1939